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No. 77-427

In the Supreme Court of the United States

OCTOBER TERM, 1977

RALPH M. KOONTZ, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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Petitioner, an employee of the Department of Housing and Urban Development ("HUD"), seeks back pay for the period during which he was suspended pending disposition of a criminal indictment against him (Pet. App. 1a).

A federal grand jury indicted petitioner on a charge of conspiracy, based on certain acts he allegedly performed in his capacity as an employee of HUD. Five days after the indictment, petitioner received from HUD a notice of its proposal to suspend him, without pay, pending disposition of the criminal charge. Petitioner submitted a written answer (Pet. App. 25a), requesting that his suspension be deferred until he was "afforded an opportunity for hearing in accordance with applicable Civil Service regulations." In the alternative, petitioner asked to be carried in a non-duty pay status for the duration of his suspension (*ibid.*). Several days later, petitioner

was notified by HUD of its decision to suspend him indefinitely. Petitioner was informed of his right to appeal this decision, and thereby to obtain a hearing, through the Civil Service Commission or through HUD (Pet. App. 22a-24a). No appeal was taken and consequently, no hearing was held. When he was acquitted on the criminal charge approximately one year later, petitioner was recalled to duty by HUD without any formal proceedings. He then demanded back pay and filed the present action when HUD refused to comply. Petitioner sued under the Back Pay Act of 1966, 5 U.S.C. 5596, which provides for awards of back pay to agency employees found to have undergone "unjustified or unwarranted personnel action."

The Court of Claims ruled (Pet. App. 1a-2a) that petitioner's case was controlled by the court's recent decision in *Jankowitz v. United States*, 533 F. 2d 538 (Ct. Cl.) (Pet. App. 3a-21a). On facts substantially similar to those presented here, the court in *Jankowitz* held that a suspension without pay is not an unwarranted personnel action for purposes of the Back Pay Act where the agency, in good faith, fully complied with personnel procedures in suspending an employee pending disposition of a criminal indictment against him (Pet. App. 6a-10a). Relying on *Jankowitz*, the court in this case entered a judgment on the pleadings, dismissing the petition and stating (Pet. App. 2a):

The legality of an indefinite suspension of employment because of a criminal indictment was fully explored in our opinion in *Jankowitz v. United States*, * * * where we found that such a procedure taken in good faith and in accordance with applicable civil service procedures must be sustained. We know of no authority to the contrary and plaintiff has shown us none.

The decision of the Court of Claims is correct, and no further review is warranted.

1. Petitioner argues (Pet. 5-9) that he was denied due process of law by virtue of the Court of Claims' decision to grant judgment on the pleadings. Since petitioner presented no genuine issue of fact, the court's action was entirely proper. Petitioner's contention, as he himself has phrased it, was and is that (Pet. 8):

when the government elected to base his suspension without pay solely on the fact of an indictment, his acquittal retroactively destroyed the legal efficacy of his indictment as a basis for suspension, rendering that adverse personnel action "unwarranted and unjustified" within the meaning of the Back Pay Act.

The Court of Claims in *Jankowitz* disagreed. Petitioner's pleadings did not distinguish his case from *Jankowitz* and, accordingly, no evidentiary hearing was required in the Court of Claims.

2. Petitioner further argues (Pet. 9) that *Jankowitz* was wrongly decided. In this case, as in *Jankowitz*, the agency followed the guidelines published in the Federal Personnel Manual ("FPM"). Relevant FPM sections clearly contemplate the possibility of suspension pending disposition of a criminal indictment. For example, FPM Supp. 752-1, S3-2a(2) provides in part (Pet. App. 8a, 33a):

Cause based on criminal indictment. Except when the agency suspends an employee indefinitely pending disposition of a criminal action, the agency should not base an adverse action on a criminal indictment or conviction. * * *

In addition, FPM Supp. 752-1, S5-3b(3) states (Pet. App. 9a):

[I]f the agency has evidence that the employee * * * was indicted by a grand jury, then the agency would have reasonable cause for believing the employee guilty of the crime * * *. * * *

See also FPM Supp. 752-1, S7-2c(2) (Pet. App. 34a).

The Notice of Proposed Suspension used by HUD in this case and in *Jankowitz* tracked the language suggested in FPM Supp. 752-1, S5-3b (Sample Notice B-7). Petitioner was informed that his "retention in an active duty status [while he was under indictment] would not be in the interest of the public, good morale, or efficient service" (*ibid.*). Thus, under the FPM, the suspension of petitioner on the basis of his indictment was not an "unjustified or unwarranted personnel action" within the meaning of the Back Pay Act. The Court of Claims properly found in both *Jankowitz* and this case that HUD had not departed from applicable federal personnel regulations.

Moreover, denial of back pay in the situation presented here does not violate petitioner's right to due process of law. At the time of his suspension, petitioner was afforded an opportunity for an administrative evidentiary hearing. At such a hearing, he could have submitted any available evidence which tended to show, on either legal or factual grounds, that the criminal charges against him could not be sustained, or any other evidence or considerations tending to indicate that he should not be suspended during the pendency of the criminal proceeding against him. Petitioner did not take advantage of that opportunity. At no time has petitioner offered to demonstrate that, in his case, the fact of indictment should not have been viewed by the agency as reasonable cause for believing him guilty of a crime. Under these circumstances, petitioner's eventual acquittal entitled him to reinstatement, but not to back pay.

3. Petitioner also argues (Pet. 10-11) that the Court of Claims' interpretation of the Back Pay Act is repugnant to the constitutional prohibition of Bills of Attainder,

since petitioner was assertedly punished without "a plenary hearing on the merits of his claim." Petitioner misconceives the nature of Bills of Attainder, which are forbidden because they involve legislative usurpation of the judicial functions of applying general rules, assessing fault, and assigning penalties in individual cases. *United States v. Brown*, 381 U.S. 437, 445-446. In the present case, petitioner is complaining of a judicial action, namely, the Court of Claims' application of the Back Pay Act as construed in *Jankowitz*. The "Bill of Attainder" label simply does not fit.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.